Amerisave Mortgage Corporation *and* Amanda A. Farahany. Case 10–CA–082519

April 29, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The issues presented are whether the Respondent, Amerisave Mortgage Corporation, violated Section 8(a)(1) of the Act by requiring its employees to resolve virtually all employment-related claims through individual arbitration, and by enforcing that requirement by moving to compel individual arbitration in response to a collective claim by its employees in federal district court under the Fair Labor Standards Act (FLSA).[1] We find, consistent with the Board's decisions in *D. R Horton, Inc.*,[2] and *Murphy Oil USA, Inc.*,[3] that the Respondent's maintenance and enforcement of its individual arbitration requirement unlawfully infringed on the employees' right to engage in concerted activity for mutual aid and protection, which includes the right to pursue employment-related claims on a joint, class, or collective basis.

FINDINGS OF FACT[4]

I. JURISDICTION

The Respondent, a Georgia corporation with an office and place of business in Atlanta, Georgia, is engaged in the retail sale of residential mortgages and related products directly to consumers located throughout the United States. During the 12-month period ending March 11, 2013, the Respondent purchased and received at its Atlanta, Georgia, facility goods valued in excess of $50,000 directly from points outside the State of Georgia. The parties have stipulated, and we find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

In the course of its business, the Respondent employs senior mortgage processors (SMPs) who provide service to loan applicants. SMPs are located throughout the U.S. and most work from their homes. They are not represented by a union.

On May 31, 2011, three former SMPs filed a complaint in federal court, alleging that the Respondent violated the FLSA during their employment by failing to pay overtime.[5] The three SMPs sought to represent a class consisting of all current and former SMPs whose FLSA rights were violated in that manner.

Prior to the filing of the lawsuit, the Respondent required some of its employees to sign a document titled "Amerisave Business Partner Program Employment Agreement" (Employment Agreement) providing that "Employee agrees that all disputes between Employee and [Amerisave] shall be settled by Arbitration." The agreement did not contain a class or collective action waiver, and is not alleged by the General Counsel to be unlawful. However, on June 8, 2011, shortly after the filing of the FLSA lawsuit, the Respondent sent all of its employees a Revised Arbitration Policy, which—as set forth in the parties' stipulation—"requires employees to waive the right to pursue class and collective actions before an arbitrator and mandates that certain employment-related disputes be arbitrated rather than litigated in a court of law." The list of employment-related covered claims is extensive and includes claims arising under the FLSA.[6] The Policy also sets forth certain exceptions:

> [C]laims for state employment insurance . . . or under the National Labor Relations Act are a not covered [sic], and thus not subject to arbitration. . . .
>
> * * *
>
> Nothing in this Arbitration Policy prohibits you from filing at any time a charge or complaint with a government agency such as the EEOC.

The Respondent informed all employees that continued employment constituted acceptance of the Revised Arbitration Policy, and it required each employee to electronically acknowledge his or her agreement. Since June

[1] 29 U.S.C. Sec. 201.

[2] 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013).

[3] 361 NLRB No. 72 (2014), enf. denied in relevant part, *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, (5th Cir. 2015).

[4] On March 11, 2013, the Respondent, the Charging Party, and the General Counsel filed with the Board a joint stipulation of facts and a motion to transfer this proceeding to the Board. The parties waived a hearing before an administrative law judge and agreed to submit the case directly to the Board for findings of fact, conclusions of law, and a Decision and Order based on the stipulated record. On May 22, 2013, the Board approved the stipulation of facts and granted the motion. Thereafter, the Respondent and the General Counsel filed briefs, and the Respondent filed a brief in response to the General Counsel. The Respondent also filed a letter brief citing supplemental authority and the General Counsel filed a reply.

[5] *Zulauf v. Amerisave Mortgage Corp.*, No. 1:11-cv-1784-WSD (N.D. Ga. 2011).

[6] The Revised Arbitration Policy is set forth in pertinent part in the Appendix B to this decision.

22, 2011, the Respondent has maintained and enforced its Revised Arbitration Policy.[7]

Pursuant to FLSA procedures and the Federal Rules of Civil Procedure, a number of former and current SMPs opted into the lawsuit as plaintiffs. On November 23, 2011, the court granted a motion by the Respondent to stay the FLSA lawsuit and compel arbitration as to those plaintiffs who had signed arbitration agreements. The court conditionally certified a class consisting of current and former employees who had worked overtime and had not agreed to submit their claims to arbitration.

At the close of the opt-in period, the opt-in plaintiffs included five individuals who had signed the Revised Arbitration Policy. On April 16, 2012, the Respondent filed a Motion to Compel Arbitration and Dismiss Collective Action as to 32 plaintiffs, including those 5.[8] On May 22, 2012, all 32 plaintiffs named in the motion filed a Notice of Withdrawal of Consent to Join the Civil Action. They withdrew their consent in anticipation that the court, consistent with its November 2011 ruling, would compel arbitration.

On June 22, 2012, the Respondent filed a Motion to Decertify Collective Action. On November 29, 2012, the court granted the Respondent's motion. The court additionally found that the Respondent's April 16, 2012 Motion to Compel Arbitration was moot, because each of the plaintiffs who was subject to that motion had withdrawn his or her consent to join the litigation. Approximately 45 employees who signed either the Employment Agreement or the Revised Arbitration Policy are proceeding to arbitrate their claims on an individual basis.

B. Procedural Background

Upon charges filed on June 6 and August 29, 2012, the General Counsel on January 23, 2013, issued an unfair labor practice complaint against the Respondent alleging the unlawful maintenance and enforcement of its Revised Arbitration Policy. The Respondent filed an answer, subsequently amended, denying the commission of any unfair labor practices and asserting various affirmative defenses.

C. The Parties' Contentions[9]

The General Counsel contends that the Respondent's Revised Arbitration Policy violates Section 8(a)(1) under the Board's decision in *D. R. Horton* because it prohibits employees from litigating employment-related claims concertedly in any forum. The General Counsel further contends that the Revised Arbitration Policy is unlawful because it was promulgated in response to activity protected by Section 7 of the NLRA, namely the employees' filing of the FLSA lawsuit. The General Counsel argues that the Respondent additionally interfered with employees' Section 7 rights by seeking to enforce the unlawful Revised Arbitration Policy through its April 16, 2012 motion to stay the collective FLSA lawsuit. The General Counsel argues that the Respondent's motion had an illegal objective under federal labor law and, under the principles enunciated in the Supreme Court's decisions in *Bill Johnson's Restaurants, Inc. v. NLRB*[10] and *BE & K Construction Co. v. NLRB,*[11] enjoys no protection under the Petition Clause of the First Amendment.

The Respondent argues that *D. R. Horton* was incorrectly decided, and should be overruled, because (in the Respondent's view) it is contrary to the broad protection afforded arbitration agreements under the Federal Arbitration Act (FAA),[12] and because procedural litigation rights are governed not by the NLRA but by the Federal Rules of Civil Procedure and the collective action procedures of the FLSA. The Respondent further contends that, in any event, its Revised Arbitration Policy does not restrict the exercise of the right to engage in collective legal activity under *D. R. Horton,* because the Revised Arbitration Policy does not preclude employees from filing complaints with government administrative agencies which, in turn, have the power to seek class-wide relief.

The Respondent additionally contends that its effort to obtain court enforcement of the individual arbitration requirement was lawful under *BE & K Construction*, supra, because its litigation was not objectively baseless in light of the endorsement by the courts of class action waivers. The Respondent asserts that the illegal objective exception to *Bill Johnson's Restaurants* and *BE & K Construction* is limited to legal actions seeking to controvert "established Board precedent," which, the Respondent contends, *D. R. Horton* is not.[13]

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[7] In April 2012, the Respondent issued a new employee manual incorporating the Revised Arbitration Policy.

[8] The remaining 27 plaintiffs were bound only by the Employment Agreement, which as noted above is not alleged by the General Counsel to be unlawful.

[9] The Charging Party did not file a brief to the Board but set forth her position, which is consistent with that of the General Counsel, in the parties' motion to transfer this proceeding to the Board.

[10] 461 U.S. 731 (1983).

[11] 536 U.S. 516 (2002), on remand *BE & K Construction Co.,* 351 NLRB 451 (2007).

[12] 9 U.S.C. Sec. 1 et seq. The Respondent cites in support, the Supreme Court's decisions in *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013); *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012); *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011); and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The Respondent also states that the rationale of *Horton* has been rejected in lower court decisions.

[13] The Respondent asserts that *D. R. Horton* is invalid because it was issued by a panel that included Member Becker, whose appointment the Respondent argues was invalid. The appointment of Member Becker

was constitutionally valid, however, and thus the Board had a quorum at the time it issued that decision. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014); *Mathew Enterprise, Inc. v. NLRB*, 771 F.3d 812, 814 (D.C. Cir. 2014); *Gestamp South Carolina, L.L.C. v. NLRB*, 769 F.3d 254, 257–258 (4th Cir. 2014); *Entergy Mississippi, Inc.,* 361 NLRB No. 89 (2014), affd. in part, revd .in part on other grounds, 810 F.3d 287 (5th Cir. 2015).

The Respondent additionally argues that Regional Director Claude T. Harrell was appointed at a time when the Board lacked a quorum, and therefore lacked authority to issue and prosecute the complaint. This argument is meritless. Regional Director Harrell was appointed on December 22, 2011, prior to the loss of a quorum. See *Bluefield Regional Medical Center*, 361 NLRB No. 154, slip op. at 2 fn. 5 (2014).

Finally, we reject the Respondent's argument, raised for the first time in a notice of supplemental authority filed August 29, 2013, that the Acting General Counsel was not properly "appointed." The notice of supplemental authority referred to the decision in *Hooks v. Kitsap Tenant Support Services, Inc.*, 2013 WL 4094344 (W.D. Wash. August 13, 2013), which, the Respondent argues, supports a finding that the Acting General Counsel was not properly "appointed" under the Federal Vacancies Reform Act and therefore lacked authority to delegate his responsibilities to Regional Director Harrell.

At the outset, we note that under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., a person is not "appointed" to serve in an acting capacity in a vacant office that otherwise would be filled by appointment by the President, by and with the advice and consent of the Senate. Rather, either the first assistant to the vacant office performs the functions and duties of the office in an acting capacity by operation of law pursuant to 5 U.S.C. § 3345(a)(1), or the President directs another person to perform the functions and duties of the vacant office in an acting capacity pursuant to 5 U.S.C. § 3345(a)(2) or (3).

On June 18, 2010, the President directed Lafe Solomon, then-Director of the NLRB's Office of Representation Appeals to serve as Acting General Counsel pursuant to subsection (a)(3)—the senior agency employee provision. Under the strictures of that provision, Solomon was eligible to serve as Acting General Counsel at the time the President directed him to do so. See *S.W. General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), petition for rehearing en banc denied, Case No. 14-1107 (Jan. 20, 2016), petition for certiorari filed, No. 15-1251 (Apr. 6, 2016). Thus, Solomon properly assumed the duties of Acting General Counsel and we find no merit in the Respondent's affirmative defense that the Acting General Counsel was "improperly and unlawfully appointed."

We acknowledge that the court in *S.W. General* also held that Solomon lost his authority as Acting General Counsel on January 5, 2011, when the President nominated him to be General Counsel. While that question is still in litigation, the Respondent never raised that argument in this proceeding, and we find that it has waived the right do so.

Finally, on November 18, 2015, General Counsel Richard F. Griffin, Jr., issued a Notice of Ratification which states, in relevant part,

> I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under section 3(d) of the Act.
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> My action does not reflect an agreement with the appellate court ruling in *S.W. General*. Rather, my ratification authorizes the continued prosecution of this matter and facilitates the timely resolution of the charges that I have found meritorious. Congress expressly exempted "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. [Citation omitted.]
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> For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

Even if the Respondent had not previously waived its right to challenge the continued authority of the Acting General Counsel following his nomination by the President, this ratification by the General Counsel would render moot any argument that the *S.W. General* holding concerning the former Acting General Counsel's authority precludes further litigation in this matter.

C. Discussion

1. The Respondent's Revised Arbitration Policy Violates Section 8(a)(1)

The Board held in *D. R. Horton, Inc.* and *Murphy Oil USA, Inc*, that an employer violates Section 8(a)(1) "'when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial.'" 361 NLRB No. 72, slip op. at 1, quoting 357 NLRB at 2277. The Board in *Murphy Oil* found that the arbitration agreement violated Section 8(a)(1) because it expressly prohibited employees from concertedly pursuing employment-related claims in any forum. See *Murphy Oil*, slip op. at 13, 18. We reach the same conclusion here.

The Revised Arbitration Policy, which employees were required to sign as a condition of employment, precludes employees from initiating or maintaining a court action concerning employment-related matters and from pursuing a class or collective claim in arbitration. Under the policy, employees are limited to filing individual arbitration claims. Accordingly, for the reasons set forth in *D. R. Horton* and *Murphy Oil,* we find that the Respondent violated Section 8(a)(1) by maintaining the Revised Arbitration Policy.[14]

Our conclusion that the terms of the Revised Arbitration Policy are unlawful is further supported by the circumstances surrounding its promulgation. The record

[14] The Respondent contends that its Revised Arbitration Policy is lawful because it permits employees to file "a charge or complaint with a government agency such as the EEOC," and thus does not, as in *D. R. Horton* and *Murphy Oil*, unlawfully prohibit them from collectively pursuing litigation of employment claims in all forums. The Respondent cites *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–1054 (8th Cir. 2013), in which the court stated, in dicta, that the arbitration agreement there did not bar all concerted employee activity in pursuit of employment claims because the agreement permitted employees to file charges with administrative agencies that could file suit on behalf of a class of employees. We reject the Respondent's argument for the reasons set forth in *SolarCity Corp.*, 363 NLRB No. 83 (2015).

The Revised Arbitration Policy exempts claims under the NLRA, and is not alleged by the General Counsel to unlawfully limit access to the Board's processes.

makes clear that, prior to the filing here by the employees of their FLSA collective action, the Respondent required employees to sign a mandatory arbitration agreement that did not contain a class action waiver. Only 1 week after the filing of the employees' lawsuit, however, the Respondent promulgated the instant Revised Arbitration Policy forbidding class or collective action in any forum. The conclusion is inescapable that the Respondent revised the policy in order to foreclose collective action by employees in pursuit of their overtime claims. The Respondent offers no legitimate explanation for the timing of its action in issuing its Revised Arbitration Policy, and none is apparent from the stipulated record.[15] We accordingly find that the Respondent's Revised Arbitration Policy was promulgated in response to the employees' protected activity of filing the FLSA lawsuit.[16] For all these reasons, we find that the Respondent, by maintaining its mandatory Revised Arbitration Policy, violated Section 8(a)(1) of the Act.[17]

Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22–35, would find that the Respondent's Revised Arbitration Policy does not violate Sec. 8(a)(1). He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, above, slip op. at 2 (emphasis in original). The Revised Arbitration Policy is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the Revised Arbitration Policy unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, above, slip op. at 17–18; *Bristol Farms*, above, slip op. at 2.

[15] See *Gaetano & Associates*, 344 NLRB 531, 532 (2005) (the timing of the employer's actions in relation to employees' protected activity may constitute persuasive evidence of unlawful conduct), enfd. mem. 183 Fed.Appx. 17 (2d Cir. 2006).

[16] See *Tarlton & Son, Inc.*, 363 NLRB No. 175 (2016) (violation established when rule is promulgated in response to union or other protected activity); *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) (same). Indeed, the policy is unlawful for this reason alone, even absent our finding that it expressly prohibits Sec. 7 activity.

[17] Our dissenting colleague agrees that employees were engaged in protected concerted activity in connection with the FLSA collective-action lawsuit. However, he argues that the Respondent did not promulgate the Revised Arbitration Policy in response to that activity but, instead, to the "collective-action nature of the lawsuit itself." We fail to see a principled basis for the distinction that our dissenting colleague attempts to draw. The salient point is that employees engaged in protected concerted activity when they filed and participated in the collective-action lawsuit and, in response, the Respondent promulgated a rule prohibiting that exact conduct. Such a rule, by its very nature, interferes with employees' exercise of their Sec. 7 rights and constitutes a straightforward violation of Sec. 8(a)(1). See *Tarlton & Son, Inc.*, supra. Our dissenting colleague further argues that, even assuming that the Respondent promulgated the Revised Arbitration Policy in response to employees' protected concerted activity, the Respondent had legitimate justifications for adopting the policy that outweigh the impact on employees' Sec. 7 rights. The Board in *Murphy Oil* rejected this argument. 361 NLRB No. 72, slip op. at 14 (the proper balancing of the respective rights of employees and employers is reflected in *D. R. Horton*'s recognition "that employees have no Section 7 right to class certification and, in turn, that employers may lawfully oppose class certification on any legally available ground *other* than an unlawful waiver in a mandatory arbitration agreement.") See also *D. R. Horton*, above at 2286 fn. 24. Moreover, it is untenable to claim, as our dissenting colleague does, that completely precluding employees from pursuing their workplace claims collectively through litigation has "virtually no impact" on Sec. 7 rights, when it actually extinguishes that Sec. 7 right. See *Murphy Oil*, above, slip op. at 14.

2. The Respondent's Enforcement of Its Unlawful Policy Violates Section 8(a)(1)

We further find that the Respondent violated Section 8(a)(1) by enforcing its unlawful Revised Arbitration Policy, by filing in federal court its April 16, 2012 motion to compel arbitration and dismiss collective action as to the plaintiffs who had signed that policy. As the Board explained in *Murphy Oil*, if an employer's arbitration policy is unlawful, the employer violates Section 8(a)(1) by enforcing the policy. 361 NLRB No. 72, slip op. at 19 (citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16–17 (1962), and *Republic Aviation Corp.*, 324 U.S. 793 (1945)). That is precisely what the Respondent did here through its motion to compel.[18]

The Respondent nevertheless contends that the enforcement allegations are moot because the court dismissed the Respondent's motion to compel as moot after the plaintiffs voluntarily withdrew their consent to join the litigation. The infringement on employees' rights does not turn on the ultimate disposition of the motion, however, but on the reasonable tendency of the motion itself to interfere with and restrain employees' exercise of protected rights.[19] Here, the motion resulted in the

[18] We reject the position of the Respondent and our dissenting colleague that the Respondent's motion to compel arbitration was protected by the First Amendment's Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, supra, 461 U. S. 731, 747, the Court identified two situations in which a lawsuit enjoys no such protection: where the action is beyond a State court's jurisdiction because of federal preemption, and where "a suit . . . has an objective that is illegal under federal law." 461 U. S. at 737 fn. 5. Thus, the Board may properly restrain litigation efforts such as the Respondent's motion to compel arbitration that have the illegal objective of limiting employees' Sec. 7 rights and enforcing an unlawful contractual provision, even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil,* supra, slip op. at 20–21; *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

[19] See, e.g., *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 541 (2003) (violation of 8(a)(1) is established if it is shown that the

withdrawal of consent to opt into the class litigation by those who had signed the Revised Arbitration Policy and reasonably will have a chilling effect on future collective efforts by the Respondent's employees. The court's ruling, therefore, does not obviate the need for a Board cease-and-desist order to deter future, similar violations by the Respondent. See *Dilling Mechanical Contractors*, 357 NLRB 544, 546 fn. 12 (2011) (illegal objective found and mootness argument rejected even where the state court disposed of the litigation in the employees' favor).[20]

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining and enforcing a mandatory arbitration policy under which employees are compelled, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Consistent with the Board's usual practice in cases involving unlawful litigation, we shall order the Respondent to reimburse the plaintiffs who had signed the Respondent's Revised Arbitration Policy for all reasonable expenses and legal fees, with interest,[21] incurred in opposing the Respondent's unlawful April 16, 2012, motion to dismiss their collective FLSA action and compel individual arbitration. See *Murphy Oil*, supra, slip op. at 21, quoting *Bill Johnson's*, 461 U.S. at 747 ("'If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" and "any other proper relief that would effectuate the policies of the Act.'"). We shall also order the Respondent to rescind or revise the Revised Policy in all of its forms and to notify employees that it has done so. See *Murphy Oil*, supra, slip op. at 21. Finally, because the parties stipulated that most senior mortgage processors work directly from their homes, we shall order that the Board's remedial notice be mailed as well as posted at the Respondent's facility.

ORDER

The National Labor Relations Board orders that the Respondent, Amerisave Mortgage Corporation, Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or enforcing a mandatory arbitration policy that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Revised Arbitration Policy in all of its forms or revise it in all of its forms to make clear to employees that the policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign the Revised Arbitration Policy that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) In the manner set forth in the remedy section of this decision, reimburse the plaintiffs who were bound by the Revised Arbitration Policy for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's April 16, 2012, motion to dismiss their wage claim and compel individual arbitration.

(d) Within 14 days after service by the Region, post at its Atlanta, Georgia, facility copies of the attached notice marked "Appendix A."[22] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representa-

employer's conduct has reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Sec. 7 rights).

[20] The Board's usual remedy under *Murphy Oil* for unlawful enforcement of an arbitration agreement includes ordering the respondent to notify the court in which it sought enforcement that it has rescinded or revised its arbitration policy and that it no longer opposes the plaintiffs' collective action on the basis of the arbitration policy. See *Murphy Oil*, supra, slip op. at 22. We are not ordering court notification here because the court dismissed the Respondent's motion to compel as moot after the plaintiffs voluntarily withdrew their consent to join the litigation.

[21] Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses."), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tive, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all current employees and former employees employed by the Respondent at any time since June 22, 2011.

(e) Within 14 days after service by the Region, duplicate and mail, at its own expense, a copy of the notice marked "Appendix A," to all current senior mortgage processor employees and former senior mortgage processors employees employed by the Respondent at any time since June 22, 2011.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 29, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

In this case, three former employees jointly filed a collective action against the Respondent in federal district court alleging violations of the Fair Labor Standards Act (FLSA). After the Respondent was served with the collective-action complaint, it revised its arbitration policy to include, for the first time, a class- and collective-action waiver, which it required all its current employees to acknowledge electronically. Subsequently, after several current and former employees opted into the lawsuit, the Respondent filed a motion to compel individual arbitration. The district court granted the Respondent's motion as to opt-in plaintiffs who were bound by the Respondent's Revised Arbitration Policy (the Revised Policy). My colleagues find that the Revised Policy violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because (i) the Revised Policy waives the right to participate in class or collective actions regarding non-NLRA employment claims, and (ii) the Revised Policy was promulgated in response to the collective-action lawsuit. Further, my colleagues find that the Respondent violated Section 8(a)(1) by enforcing the Revised Policy. For the reasons set forth below, I respectfully dissent.

1. *The Class-Action Waiver*. I believe the Revised Policy's class- and collective-action waiver is lawful for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[1] I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[2] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[3]

[1] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

[2] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). Indeed, such was the case here, as I explain below. However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

[3] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legisla-

This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[4] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;[5] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[6] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.[7]

2. *Promulgation in Response to the Collective-Action Lawsuit*. My colleagues find that the Respondent violated Section 8(a)(1) of the Act by promulgating the Revised Policy in response to protected concerted activity. I believe the stipulated record supports a finding that employees engaged in protected concerted activity in connection with the federal district court FLSA collective-action lawsuit. However, I do not believe that the Respondent adopted the Revised Policy in response to that activity. Rather, I believe the Revised Policy was adopted in response to the collective-action nature of the lawsuit itself, which is not protected under the NLRA. But even assuming otherwise, in my view the justifications for adopting the Revised Policy outweigh any potential impact on employees' Section 7 rights.

Section 7's "'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums," *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978), and I agree that some protected concerted activity occurred in connection with the federal district court lawsuit. But unlike my colleagues, I believe it is immaterial whether or not class-type procedures were applicable to the lawsuit. Rather, Section 7 protection existed because Section 7's statutory requirements were met: three former employees engaged in concerted activity (jointly initiating and pursuing the federal court lawsuit) with the purpose of mutual aid or protection (challenging the Respondent's overtime practices).[8] See *Murphy Oil*, above, slip op. at 23–25 (Member Miscimarra, dissenting); see also *Beyoglu*, above, slip op. at 4–5.

Moreover, although the Respondent promulgated the Revised Policy shortly after the three former employees jointly initiated the federal district court lawsuit, I do not believe the promulgation of the Revised Policy constituted unlawful restraint or coercion of or interference with NLRA-protected activity in violation of Section 8(a)(1) of the Act. In my view, the record fails to establish that the Revised Policy was adopted in response to NLRA-protected employee activity. As noted above, the "protected concerted activity" issue (whether two or more employees engaged in lawsuit-related concerted activity

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tive history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[4] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12-60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[5] The Fifth Circuit has repeatedly denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See, e.g., *Murphy Oil, Inc., USA v. NLRB*, above; *D. R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc.*, 96 F. Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.*, No. 1:12-cv-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA); but see *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14-1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

[6] For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

[7] Because I disagree with the Board's decisions in *Murphy Oil,* above, and *D. R. Horton, Inc.,* 357 NLRB 2277 (2012), enf. denied in pertinent part 737 F.3d 344 (5th Cir. 2013), and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they "leave[] open a judicial forum for class and collective claims," *D. R. Horton*, 357 NLRB at 2288, by permitting the filing of complaints with administrative agencies that, in turn, may file class- or collective-action lawsuits. See *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013).

[8] Former employees of an employer are "employees" as defined in the NLRA. See *Briggs Mfg. Co.*, 75 NLRB 569, 570-571 (1947) (holding that "employee" as defined in Sec. 2(3) of the Act "covers . . . former employees of a particular employer"); *Eastex*, above at 564.

for mutual aid or protection) is distinct from the "class action procedures" issue (whether or not class-type procedures applied to the non-NLRA lawsuit). Although the timing of the promulgation of the Revised Policy suggests that the Respondent was motivated by a desire to provide an alternative to class action procedures, there is no evidence that the Revised Policy would preclude employees from engaging in NLRA-protected activity associated with non-NLRA claims.[9] In finding that the Respondent promulgated the Revised Policy in response to protected activity, my colleagues conflate class litigation procedures with NLRA-protected activity. However, as explained above and in my partial dissent in *Murphy Oil*, when employees pursue non-NLRA claims, the applicability of class action procedures does not necessarily mean employees are engaged in NLRA-protected activity, and the unavailability of class action procedures does not preclude employees from engaging in NLRA-protected activity. See *Murphy Oil*, above, slip op. at 24–26 (Member Miscimarra, dissenting in part).

Moreover, even if the Respondent adopted the Revised Policy in response to NLRA-protected activities associated with the federal district court collective-action lawsuit, this does not automatically mean the Respondent has violated Section 8(a)(1). In *Eastex v. NLRB*, the Supreme Court stated that, when determining whether an employer's adverse action taken in response to employee conduct violated Section 8(a)(1), "[t]wo distinct questions" must be considered: first, whether the employee conduct is protected by Section 7, and second, whether the employer's "countervailing interest . . . outweighs the exercise of § 7 rights." 437 U.S. at 563; see also *City Market*, 340 NLRB at 1260 fn. 2 (employer may demonstrate that "'promulgation of a [new rule] upon the commencement of [Section 7 activity] . . . was justified because the [Section 7 activity] brought about substantial work disruption'") (quoting *NLRB v. Roney Plaza Apartments*, 597 F.2d at 1049). Thus, even if the Revised Policy was implemented in response to NLRA-protected activity in connection with the lawsuit, the Board must assess the legality of that action under Section 8(a)(1) by taking into account not only the potential impact on NLRA rights, but also relevant justifications unrelated to NLRA-protected activity. See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963) (stating that the Board must discharge the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner").[10]

Here, as noted above, the Revised Policy has virtually no impact on rights afforded under the NLRA. The Revised Policy does not impose job-related consequences on any employees who concertedly file a lawsuit covered by the Revised Policy. Nor does the Revised Policy penalize employees for or prevent them from pursuing their non-NLRA claims against the Respondent.[11] Although the Revised Policy requires employees to pursue their claims in arbitration, the Supreme Court has held that electing an arbitral rather than a judicial forum does not unlawfully prevent litigants from effectively vindicating their claims.[12] Questions regarding whether the Revised Policy can be relied upon by the Respondent as a defense in a non-NLRA lawsuit should be resolved by the court that, unlike the NLRB, has jurisdiction over the claims asserted in that litigation.[13] It is true that the Revised Policy precludes employees from using class- or collective-action procedures when pursuing non-NLRA claims.

[9] See *City Market, Inc.*, 340 NLRB 1260, 1260 (2003) (rule promulgated in context of Section 7 activity not unlawful if the timing can be explained by matters apart from the Section 7 activity); see also *NLRB v. Roney Plaza Apartments*, 597 F.2d 1046, 1049 (5th Cir. 1979) ("Reasonable restrictions . . . are not per se invalid because imposed during [Section 7 activity]. The Act does not require an employer to anticipate all problems and provide for them by written rule."), enfg. 232 NLRB 409 (1977).

[10] See also *Republic Aviation v. NLRB*, 324 U.S. 793, 797–798 (1945); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967); cf. *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 13–18 (2015) (Member Miscimarra, dissenting in part).

[11] Under the Revised Policy, employees are free to engage in a broad range of concerted activities for the purpose of mutual aid or protection in connection with non-NLRA legal claims. The Revised Policy in no way interferes with the right of employees, among other things, to meet with one another to identify evidence supporting non-NLRA employment-related claims; to engage in work stoppages (if not prohibited by a collective-bargaining agreement) or otherwise express solidarity and mutual support for one another in connection with non-NLRA employment-related claims; to concertedly meet with an attorney or attorneys regarding non-NLRA employment-related proceedings; or to publicize and/or raise funds for non-NLRA employment-related agency or court cases. The right of employees to engage in these types of protected concerted activities is central to the NLRA—in contrast to the procedural treatment afforded to non-NLRA claims, which does not implicate the NLRA.

[12] See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 249 (2009) (agreement to arbitrate ADEA claims did not prevent their effective vindication because agreement did not "waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("'By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).

[13] As I stated in *Beyoglu*, we are not permitted to "'tak[e] it upon ourselves to assist in the enforcement of other statutes. The Board was not intended to be a forum in which to rectify all the injustices in the workplace.'" *Beyoglu*, 362 NLRB No. 152, slip op. at 5 (Member Miscimarra, dissenting) (quoting *Meyers Industries*, 281 NLRB 882, 888 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)).

Again, however, the existence or unavailability of class-type procedures has no bearing on whether employees can engage in NLRA-protected activity.[14] In *Eastex*, for example, the Supreme Court cited numerous cases where employees were found to have engaged in NLRA-protected activity in connection with an agency or court proceeding involving a non-NLRA claim or complaint,[15] and *none* of the cases involved or turned on the availability of class-type procedures.

I also believe that the Respondent had legitimate and substantial justifications for adopting the Revised Policy. Contrary to the views expressed by my colleagues, who fault the Respondent for its desire to avoid class-type lawsuits, the Supreme Court has recognized that it is entirely legitimate to use arbitration agreements, including those that prohibit class claims, as a means to avoid class-action litigation in courts.[16] Class-action lawsuits may result in high costs, lengthy proceedings, and "'in terrorem' settlements."[17] Arbitration agreements that include restrictions on class claims may permit legal disputes to be resolved more efficiently in a streamlined manner that is tailored to the type of dispute,[18] increasing the speed of dispute resolution and substantially reducing the costs.[19] Moreover, the availability of arbitration as an alternative to court litigation may also substantially benefit employees, who may lack the resources or time required to litigate their non-NLRA claims in court.[20] For these reasons, even if the Revised Policy's adoption were found to have some adverse impact on NLRA-protected activity, in the circumstances presented here I believe such an impact would be outweighed by legitimate justifications unrelated to NLRA-protected activity. These considerations, and those discussed above, warrant a finding that the Respondent did not violate Section 8(a)(1) when it adopted the Revised Policy.

3. *Enforcing the Revised Policy*. Because I believe the Respondent's Revised Policy was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in federal district court seeking to enforce the Revised Policy. It is relevant that the district court that had jurisdiction over the non-NLRA claims *granted* the Respondent's motion to compel arbitration. That the Respondent's motion was reasonably based is also supported by court decisions that have en-

[14] See above fns. 2-5 and accompanying text.

[15] See *Eastex*, 437 U.S. at 565, citing *Walls Mfg. Co.*, 137 NLRB 1317, 1319 (1962) (employee's discharge in retaliation for letter to "State regulatory agency"—the state health department—complaining about unsanitary conditions violated Sec. 8(a)(1)), enfd. 321 F.2d 753 (D.C. Cir. 1963), cert. denied 375 U.S. 923 (1963); *Socony Mobil Oil Co.*, 153 NLRB 1244, 1245, 1248 (1965) (employee suspension in retaliation for alleged insolent and insubordinate behavior "during the Coast Guard investigation aboard ship" and "complaint to the Coast Guard" violated Sec. 8(a)(1)), enfd. 357 F.2d 662 (2d Cir. 1966); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (two employee discharges based on alleged failure to read affidavits filed in union's state court injunction proceeding violated Sec. 8(a)(1); court finds that "filing by employees of a labor related civil action is protected activity under section 7"), enfg. 223 NLRB 696 (1976); *Wray Electric Contracting, Inc.*, 210 NLRB 757, 761 (1974) (employee discharge for filing "a complaint with OSHA" on behalf of union violated Sec. 8(a)(3) and (1)); *King Soopers, Inc.*, 222 NLRB 1011, 1018 (1976) (employee discharge in retaliation for employee's filing of "civil rights charges" with EEOC and state EEO agency violated Sec. 8(a)(1)); *Triangle Tool & Engineering, Inc.*, 226 NLRB 1354, 1357 (1976) (employee discharge in retaliation for union activity and "soliciting the aid of the Wage and Hour Division" of the U.S. Dept. of Labor violated Sec. 8(a)(3) and (1)); *Alleluia Cushion Co.*, 221 NLRB 999 (1975) (employee discharge in retaliation for employee's filing of "letter of complaint to the California OSHA office" violated Sec. 8(a)(1)). The Board's decisions in *Alleluia Cushion* and its progeny—where the conduct of a solitary employee was deemed "concerted" whenever the purpose of that activity was one the Board wished to protect—was overruled in *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[16] See *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2312 (2013) (arbitration agreement containing class-action waiver enforceable); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345–346 (2011) (the Federal Arbitration Act "was designed to promote arbitration" and "embod[ies] a national policy favoring arbitration").

[17] *Concepcion*, above at 350.

[18] Id. at 344 (arbitration "allow[s] for efficient, streamlined procedures tailored to the type of dispute").

[19] Id. at 345 ("[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution."); *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 685 (2010) (benefits of arbitration include "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.").

[20] Arbitration provisions in collective-bargaining agreements have been celebrated by Congress and the courts. See, e.g., Labor Management Relations Act Sec. 203(d) ("Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) ("Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties."). As I stated in *Murphy Oil*, our statute does not render individual arbitration agreements "inherently suspect or unenforceable, particularly when the agreements relate exclusively to non-NLRA legal rights," *Murphy Oil*, above, slip op. at 33 (Member Miscimarra, dissenting in part), and the Supreme Court has stated that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative," *14 Penn Plaza*, above, 556 U.S. at 258.

forced similar agreements.[21] As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class-waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."[22] I also believe that any Board finding of a violation based on the Respondent's meritorious federal court motion to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB,* 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil,* above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the plaintiffs for their attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

Accordingly, as to the foregoing issues, I respectfully dissent.[23]

Dated, Washington, D.C. April 29, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our Revised Arbitration Policy in all of its forms or revise it in all of its forms to make clear that it does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign our Revised Arbitration Policy that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

WE WILL reimburse the plaintiffs who were bound by the Revised Arbitration Policy for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our April 16, 2012, motion to dismiss their wage claim and compel individual arbitration, plus interest.

AMERISAVE MORTGAGE CORP.

The Board's decision can be found at www.nlrb.gov/case/10–CA–082519 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[21] See, e.g., *Murphy Oil, Inc., USA v. NLRB,* above; *Johnmohammadi v. Bloomingdale's,* 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc.,* above; *Sutherland v. Ernst & Young LLP,* 726 F.3d 290 (2d Cir. 2013).

[22] *Murphy Oil USA v. NLRB*, 808 F.3d at 1021.

[23] I join my colleagues in finding that the Board had a quorum at the time it issued its decision in *D. R. Horton*, above, and when it appointed Regional Director Claude T. Harrell, and in rejecting the Respondent's arguments regarding former Acting General Counsel Lafe Solomon.

APPENDIX B

1. Any "covered claim" that you may have against Amerisave (or its owners, directors, officers, managers, employees or agents) or that Amerisave may have against you shall be submitted exclusively to and determined exclusively by binding arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 et seq., regardless of the state in which the arbitration is held or the substantive law applied in the arbitration.

2. Covered claims include, but are not limited to, claims prior and/or subsequent to this policy, regardless of when the claims have occurred or accrued arising under the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), 42 U.S.C. § 1981, including amendments to all the foregoing statutes, the Employee Polygraph Protection Act, state discrimination statutes, state wage statutes, and/or common law regulating employment termination, misappropriation, breach of the duty of loyalty, the law of contract or the law of tort, including, but not limited to, claims for malicious prosecution, wrongful discharge, wrongful arrest/wrongful imprisonment, intentional/negligent infliction of emotional distress or defamation.

Conversely, claims for state employment insurance (e.g., unemployment compensation, workers' compensation, worker disability compensation) or under the National Labor Relations Act are a not covered [sic], and thus not subject to arbitration. If applicable, statutory or common law claims made outside of the state employment insurance system alleging that Amerisave retaliated or discriminated against an employee for filing a state employment insurance claim, however, are covered claims, and shall be subject to arbitration.

3. Amerisave and you are required to bring all claims subject to arbitration in one arbitration proceeding. Any such claims not brought in one arbitration shall be waived and precluded. The arbitrator shall have the power to hear as many claims you or Amerisave may have against each other consistent with the terms of this Agreement.

The arbitrator has no authority to and shall not consolidate claims of different employees into one proceeding, nor shall the arbitrator have the power to hear an arbitration as a class or collective action (a class or collective action involves an arbitration or lawsuit where representative members of a group who claim to share a common interest seek class or collective relief), and you shall not be allowed to submit your claim(s) against Amerisave to arbitration as a representative of or participant to a class or collective action or a claim seeking class or collective relief.

4. The arbitration is administered by the American Arbitration Association (AAA) and the employment arbitration portion of the AAA's Employment Arbitration Rules and Mediation Procedures. Arbitration is held before one neutral, third-party Arbitrator. If there are any differences between this Agreement and the employment arbitration portion of the AAA's Employment Arbitration Rules and Mediation Procedures, this Agreement shall apply.

5. Nothing in this Arbitration Policy prohibits you from filing at any time a charge or complaint with a government agency such as the EEOC. However, upon receipt of a right to sue letter or similar administrative determination, your claims become subject to arbitration as defined herein.

6. Neither Amerisave nor you can file a civil lawsuit in court against the other party relating to such covered claims. If a party files a lawsuit in court to resolve claims subject to arbitration, both agree that the court shall dismiss the lawsuit and require the claim to be resolved through arbitration.

The Board's decision can be found at www.nlrb.gov/case/10–CA–082519 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.